Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1278

CLIFTON C. TANG,

Petitioner,

against

APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, FIRST DEPARTMENT, and Honorable Justices ARON STEUER, OWEN MCGIVERN, and LOUIS J. CAPOZZOLI,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner (a New Jersey attorney whose application for admission to the New York bar was denied on July 6, 1972 by a divided Appellate Division of the Supreme Court, First Judicial Department on the ground that he had not satisfied New York's six month "actual residence" requirement and who chose not to exercise his right of appeal to the New York Court of Appeals from that denial) seeks certiorari to review an October, 1973 judgment of the United States Court of Appeals for the Second Circuit, which affirmed an order of the United States District Court for the Southern District of New York denying his application to convene a three-judge Court and its judgment dismissing his complaint herein.

Jurisdiction

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals judgment which he seeks to review by a February, 1974 petition was entered on October 19, 1973, but we shall assume that his time to petition was extended by his petition for rehearing which was denied on November 30, 1973.* See *Gypsy Oil Co.* v. *Escoe,* 275 U.S. 498 (1927).

Question Presented

Since this Court, in *Rose* v. *Bondurant,* 409 U.S. 1020 (1972) sustained a New Mexico requirement that an applicant for bar admission be an actual resident of that State for six months prior to admission, the sole question presented upon this record is whether this Court should deem it appropriate or necessary to review the constitutionality of the New York requirement that an applicant

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* In that rehearing application he had repeated a "suggestion for a hearing *en banc*" which had been denied before argument by Chief Judge Henry J. Friendly on January 24, 1973.

The petitioner had also sought to exploit federal procedure by having the Second Circuit direct a "prehearing conference" pursuant to Rule 33 Federal Rules of Appellate Procedure. That motion had been denied on March 9, 1973 by the Second Circuit.

Despite the fact that the November 30, 1973 order denying rehearing recited that "no active judge or judge who was a member of the panel" had requested that a vote be taken on petitioner's "suggestion" that the "action be reheared *en banc*", petitioner moved further on January 15, 1974 to recall the mandate of the Court of Appeals. On January 23, 1974, that Court complied with petitioner's request to take judicial notice of *Titus* v. *Supreme Court of Virginia,* 359 F. Supp. 549 (E.D. Va. 1973), affd. 42 U.S.L.W. 3301 (Nov. 20, 1973) (No. 415) and *Americ. Trial Lawyers Ass'n.* v. *New Jersey Supreme Court,* 409 U.S. 467 (1973), but adhered to its prior order "denying *en banc* consideration" and denied petitioners "motion dated January 15, 1974 to recall the mandate".

for admission to its bar be an actual resident of New York for six months prior to admission.

In deciding that question, it should be noted that the New York Court of Appeals, which petitioner chose to avoid, presently has pending before it two cases in which the construction and validity of the New York requirement are being challenged. *Matter of Lotsof* (No. 1973-663); and *Matter of Behrle* (No. 1974-86). It should also be observed that the petitioner, although he had failed to perfect any appeal to the New York Court of Appeals, has, after filing this petition for certiorari, now requested that Court's permission to file an *amicus* brief in the *Behrle* appeal (Motion for Leave, dated February 28, 1974; Appendix A, annexed hereto).

Under these circumstances, it is unnecessary for this Court to reach the federal questions which petitioner seeks to present here as to whether a three-judge Court should have been convened in this action, particularly since a three-judge Court of Appeals later considered his contentions; and as to whether that Court of Appeals correctly refused on grounds of *res judicata* or comity to review the judgment of the New York Appellate Division upon the federal constitutional questions which petitioner had allegedly presented to the Appellate Division.

ARGUMENT

No substantial federal question is presented by the petition. A similar residence requirement has been sustained in *Suffling* v. *Bondurant*, 339 F. Supp. 257 (D.N. Mex., 1972), aff'd *sub nom. Rose* v. *Bondurant*, 409 U.S. 807 (1972) 34 L. Ed. 2d 312, 93 S. Ct. 460.

(1)

The constitutional questions presented by applicant have already been rejected by this Court in *Rose* v. *Bondurant*, cited in our pointhead (*supra*). The New Mexico

statute challenged in that case, like the statute here involved, required that an applicant for admission to the bar have been an "actual resident" of the State for "at least six months prior to admission". *In addition, it required that an applicant be "an actual bona fide resident of the state" at the time of examination.* The terms of the New Mexico statute are set forth at the outset of the majority memorandum opinion of the District Court in *Suffling* v. *Bondurant,* 339 F. Supp. 257, where the Court stated (at p. 258):

> "The Board of Bar Commissioners appointed by the Supreme Court of the State of New Mexico promulgates rules and regulations governing admission to the New Mexico State Bar. These are contained in Section 18-1-8 N.M.S.A. (1953 Comp.). Rule II, subd. A, par. 8 provides:
>
> 'An applicant for admission to the bar upon examination, except an attorney duly admitted to the bar in another state and actually engaged in the practice of law therein, must be an actual bona fide resident of the State of New Mexico at the time of examination. An applicant for admission to the bar, either upon examination or upon certificate and motion must be a citizen of the United States, an actual bona fide resident of the State of New Mexico for at least six months prior to admission, 21 years of age and of good moral character.'"

(2)

We note that the United States Court of Appeals in this case did not deem *Suffling* to have decided the constitutional issue presented by *Tang.* Judge MULLIGAN wrote (487 F.2d 138, at p. 140):

> "In *Suffling,* a three-judge court held that the New Mexico Supreme Court rule requiring six months' residence before admission to the bar did not violate

the equal protection clause or the constitutionally based right to travel. The court reasoned that six months was a reasonable period for providing the state an opportunity to examine the character and fitness of the applicant. The Supreme Court affirmed without opinion.

"The question in the instant case differs from *Suffling* because of the interpretation given to the New York statute by the New York courts, since the Appellate Division interpreted New York CPLR 9406(3) to require *permanent* residence not merely six months' residence. Thus, the New York requirement of actual residence as interpreted by the New York courts is substantially broader than that approved in *Suffling* and affirmed by the Supreme Court. The question remains whether the broader New York residence requirement had a 'rational connection with the applicant's fitness or capacity to practice law.' *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957). We do not reach this issue."

Tang's constitutional claims were rejected by the federal Court of Appeals because they deemed them to have been raised and passed upon by the First Department and regarded Tang's federal suit to be an effort to have federal appellate review of a state court decision on a federal constitutional question. This reasoning is reflected in the portion of Judge Mulligan's opinion, where he wrote (p. 141):

"The appellant has conceded on oral argument that in his state proceeding, he raised the same federal constitutional issues which he now relies upon in the federal court in this action under 42 U.S.C. § 1983. See *Grubb* v. *Public Util. Comm'n,* 281 U.S. 470, 477-78 (1930). There is no question but that Tang could have appealed the three-two decision of the Appellate Division to the New York Court of Appeals on the merits (the interpretation to be given 'actual residence' in

New York CPLR 9406(3)) as well as on the federal constitutional questions. In the event that he was unsuccessful he would have been assured of a direct appeal to the United States Supreme Court. Tang however abandoned the state courts after the intermediate ruling of the Appellate Division and is now in effect seeking a review of the constitutional issues in a federal court. The district court lacks jurisdiction to review state court determinations of federal constitutional questions and on that ground we affirm the dismissal of the action. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923)."

(3)

Although the Attorney General has succeeded in obtaining a dismissal of this federal suit instituted by *Tang*, we do not deem it inappropriate to indicate that the federal Court of Appeals seems to have underemphasized the fact that the statutory provision here questioned and the rule involved in the New Mexico case affirmed by the U.S. Supreme Court were *virtually identical*. This fact finds support in other portions of the District Court opinion in *Suffling* (*supra*). There the Court noted (339 F. Supp. 257, at p. 258):

"Rose passed the New Mexico bar examination in August, 1970. *He claims residence by reason of having lived in New Mexico as late as October, 1960, having gone to school at the University of New Mexico and by virtue of employment and enlistment in the Marine Corps here. He claims dual residency with California.* Prior to passing the New Mexico Bar examination, he attended school in California as a resident *and took and passed the California bar examination as a resident.* Rose resides in California and practices law in that state." (Italics supplied.)

The *Suffling* court stated (p. 259):

> "The question seems to turn on the length of time required to determine good character and to establish residence before admission and whether that length of time is reasonable.
>
> "While the regulations require that residence and good moral character be established before taking the bar examination, the Commissioners have allowed the residence period to start at any time before the bar examination with the balance to be filled out after the examination. Residence in New Mexico can start at any time from five months and 29 days before or on the day of the examination with the balance of time to be completed after the examination and good moral character can be established after the examination.
>
> "None of the cases in which residency requirements have been held unconstitutional deals with the requirements as liberal as those of New Mexico."

It distinguished carefully the cases in which less reasonable residency requirements had been rejected as unconstitutional. The Court wrote (p. 259):

> "Mississippi required *twelve months'* residency *prior to application* to take the examination and further required that a written application be filed at least ninety days before the time of examination. Residency in Mississippi was thus required for a total of *fifteen months.* Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971).
>
> "Georgia required establishment of good moral character *before taking the examination* and twelve months' residence after passing the examination prior to admission. Webster v. Wofford, supra. North Carolina required *twelve months'* residence *prior to taking the examination* and gave the examination only once each year. Keenan v. Board of Law Examiners

of State of North Carolina, 317 F. Supp. 1350 (E.D. N.C. 1970). In no case was less than *one year's* residence required and in *Keenan* the time could run as high as *two years.*" (Italics supplied.)

After further review of the curious Hawaiian requirement set forth in the *Potts* opinion, the Court set forth its conclusion (with reference to its "actual bona fide resident" requirement) as follows (p. 260):

"[2] We conclude that six months' residence in New Mexico to be commenced either any time before the bar examination or as late as the day of the bar examination is a reasonable period in which to afford the Board of Bar Examiners an opportunity to investigate the morals and character of those persons who seek to become members of the New Mexico bar. It also provides a realistic time period in which three members of the bar residing in the applicant's locality can certify regarding his moral character as required by Rule VI (38) of the Rules Governing Bar Examiners.

[3] Considered under the traditional test of reasonable classification which is the standard we hold applicable, the six-month residency requirement is reasonable and does not unduly penalize petitioners' right to interstate travel. While rejecting application of the stricter test of Equal Protection in this case, Lipman v. Van Zant, supra, 329 F. Supp. at page 403, we express the view that a state does have a compelling interest in the quality and integrity of the persons whom it licenses to practice law and may impose regulations which promote that interest.

"An order will be entered adjudging that the requirement of six months' residency in New Mexico for applicants seeking admission to the bar is constitutional."

(4)

We would hesitate to find any great distinction between the six month "actual bona fide resident" requirement of the New Mexico rules and the six month "actual resident" requirement of New York's CPLR 9406(3). Although the United States Court of Appeals chose in this case to find a distinction between a mere residence requirement and a "permanent" residence requirement, we would deem the purpose of both statutory proxisions to have been similar. Decisions upon the appeals pending before the New York Court of Appeals in *Matter of Behrle* and *Matter of Lotsof* may cast some further light upon the interpretation and purpose to be given to the New York statute by its highest Court.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, New York, March 12, 1974

Respectfully submitted,

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APPENDIX

Motion for Leave to Submit an Amicus Curiae Brief.

COURT OF APPEALS, STATE OF NEW YORK

In the Matter of the Application of

SANDRA GALE BEHRLE

For Admission to the Bar

COUNTY OF BERGEN,
STATE OF NEW JERSEY } ss.:

CLIFTON C. TANG, being duly sworn, deposes and says:

1. I am the excluded bar-applicant in *Application of Tang*, 39 App.Div.2d 357, 333 N.Y.S.2d 964 (1972).

2. I learned from the New York Law Journal, December 12, 1973 issue, that the decision appealed from was reached by the Appellate Division below "on constraint of" its decision in my application.

3. I move the court for leave to submit an amicus curiae brief for the purpose of calling this court's attention to certain questions of law, which arose out of *Application of Tang* and which have been presented to the United States Supreme Court in movant's petition for a writ of certiorari for its discretionary consideration. The petition was docketed on February 19, 1974.

4. In view of the subject matter before the court, I believe that public interest is best served by this court's prompt

consideration of all constraints, which arose out of *Application of Tang*, upon all bar-applicants and their families, present and future.

Respectfully submitted,

CLIFTON C. TANG
CLIFTON C. TANG,
228 East Clinton Avenue,
Tenafly, N. J. 07670

Sworn to before me this 28 day
of Feb., 1974.
CATHERINE C. MARSHALL
My Commission Expires

December 8, 1976